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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No.

CECIL LEVERN HUMPHRIES, Petitioner,

versus,

STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT.

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QUESTION PRESENTED

I.

Did the trial court err in violation of Petitioner's rights under the United States Constitution by denying the Petitioner's motion to strike the testimony of Officer Zickafoose presented during the State's case in reply?

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OPINION BELOW

The opinion of the South Carolina Supreme Court is reported in Memorandum Opinion No. 82-MO-323, filed November 9, 1982, as reproduced in Petitioner's Appendix A at pages 11-12.

JURISDICTION

Respondent does not question the Court's jurisdiction in this proceeding.

QUESTION PRESENTED

I.

Did the trial court err in violation of Petitioner's rights under the United States Constitution by denying the Petitioner's motion to strike the testimony of Officer Zickafoose presented during the State's case in reply?

ARGUMENT

I.

The trial court did not err in violation of Petitioner's rights under the United States Constitution by denying the Petitioner's motion to strike the testimony of Officer Zickafoose presented during the State's case in reply.

The Petitioner's basic contention in his argument is that the trial court erred by failing to hold an in camera

hearing requested by the Petitioner during the State's case in reply in violation of Petitioner's Fifth Amendment rights. The Respondent would submit that since the testimony was submitted in reply by the State to contradict and impeach the testimony of the Petitioner, the trial court did not err by failing to hold an in camera hearing concerning the constitutional right of Petitioner to remain silent and against self-incrimination since such rights do not prevent the use of prior statements of the Petitioner to impeach or contradict his testimony. Further the Respondent would submit that since the request for a hearing came only as part of a motion to strike the entire testimony which was made only after the direct examination and during the cross-examination of the witness, the

trial court did not err by denying the motion or failing to hold a hearing.

The record reflects that an in camera hearing was held concerning the statements made by Petitioner to Officers Bowers and Propps, which the court ruled were freely and voluntarily made. (Petition, p. 35). The Petitioner then testified and denied again ever being read or informed of his constitutional rights. (Petition, p. 96). The Petitioner admitted talking to Officer Zickafoose and gave his version of the conversation, which did not include any incriminating statements. (Petition, pp. 100-101). He then denied ever making any incriminating statements during cross-examination. (Petition, pp. 115-117). Officer Zickafoose then testified in reply that during his discussion with Petitioner, he had

informed the Petitioner of his constitutional rights and that the Petitioner made certain incriminating statements. (Petition, pp. 120-122). After the direct examination of Officer Zickafoose, during cross-examination the following occurred:

> Q. If Your Honor please, we move to strike that testimony. He hasn't complied.
>
> COURT: On what grounds?
>
> Q. With the Miranda warning.
>
> COURT: He said he gave him the full Miranda warnings.
>
> Q. He said that that's all he had given him, that if he didn't have an attorney, if he wanted to stop at any time he could do so and he wouldn't ask him any further questions. That's all he asked him. Nothing else. I think we'd better take it out of the presence of the jury.
>
> COURT: No, sir. I'm ready to rule. Your exception is noted. You may proceed. (Petition, p. 123).

It is proper for the State in a

criminal case to introduce in rebuttal any competent evidence which tends to explain, contradict or contravene evidence introduced by the defense. State v. McDowell, 272 S.C. 203, 249 S.E.2d 916 (1978); State v. Sharpe, 138 S.C. 58, 135 S.E. 635 (1926); State v. Johnson, 137 S.C. 7, 133 S.E. 823 (1926); 23 C.J.S. Criminal Law §1050. Where the defendant takes the stand and testifies, he is under an obligation to speak the truth. The shield of the Fifth Amendment right to remain silent and against self-incrimination does not extend to evidence introduced to impeach or to contradict the testimony of the defendant. Harris v. New York, 401 U.S. 222, 91 S. Ct. 643, 28 L.Ed.2d 1 (1971); United States v. Havens, 446 U.S. 620, 100 S. Ct. 1912, 64 L.Ed.2d 559 (1980); State v. Mercado, 263 S.C. 304, 210 S.E.

2d 459 (1974). In this case the defendant had testified and the testimony of Officer Zickafoose was introduced to contradict the testimony of the defendant. The protections of the Fifth Amendment did not extend to the statements of the defendant used to contradict his testimony, thus the trial court did not err by not holding an in camera hearing to determine whether the statements were made in derogation of those rights.

Further, as the record reflects, the request for a hearing was made after the direct testimony of the witness and as part of a motion to strike. The testimony of the witness concerning the events surrounding the statements were already before the trial court and the jury. There was no abuse nor was there any necessity to hold a hearing.

The Respondent respectfully submits that the holding of the South Carolina Supreme Court in this case did not deny the Petitioner any of his constitutional rights, and that the Petitioner is not entitled to a Writ of Certiorari.

CONCLUSION

For the foregoing reasons, Respondent submits that Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT.